NOT DESIGNATED FOR PUBLICATION

DIVISION III

CACR07-1354

JAMES COTHERN

September 10, 2008

APPELLANT

V.

APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT
[NO. CR2005-987]

STATE OF ARKANSAS

HON. JOHN FOGLEMAN, JUDGE

APPELLEE

AFFIRMED

James Cothern was convicted in a Craighead County jury trial of possession of drug paraphernalia; possession of methamphetamine; possession of pseudoephedrine with intent to manufacture methamphetamine; and simultaneous possession of drugs and firearms. He was sentenced to 120 months' imprisonment in the Arkansas Department of Correction and fined $12,000. On appeal, he argues that the trial court erred by refusing to grant his directed-verdict motion and by refusing to give a jury instruction on the legal definition of joint occupancy. We affirm.

On August 25, 2005, Cothern was arrested in a home rented to his wife, Misty Cothern, who also went by the aliases of Misty Brewer and Holly Brewer. Entry into the residence was the culmination of a several-months-long investigation of Misty. The investigation was advanced when a priority mail package addressed to Misty fortuitously broke open revealing pseudoephedrine tablets inside. Pursuant to a federal warrant, the

package was fully opened and a total of 25.92 grams of pseudoephedrine tablets was discovered by postal inspectors. The Brookland Post Office notified the Second Drug Task Force, who obtained an anticipatory warrant, which was executed at approximately 9:55 a.m. when a postal inspector delivered the package. Misty accepted delivery. Five minutes later, the drug task force executed a search warrant and entered the residence.

When police first made contact with Cothern, he was standing in the kitchen clad only in his boxer shorts. Misty was found in the garage. A search of the dwelling revealed contraband in three primary locations: the coffee table in the living room, a large red duffle bag in the master bedroom, and a locked gun safe, also located in the master bedroom.

On the coffee table was the package that Misty had accepted just minutes before the drug task force entered the residence. The package was open and the contents were emptied out. The large red duffle bag contained two loaded semi-automatic Glock .45 caliber handguns with three additional ten-round magazines, a loaded Ruger 390 .45 caliber handgun with three additional eight-round magazines, two military-style knives, a Crown Royal bag containing a red straw which could be used for "snorting" drugs and a vial containing methamphetamine, and a photo album that contained photographs of Cothern. The gun safe contained a book entitled "The Secrets of Methamphetamine Manufacture, Third Edition" authored by Uncle Fester; an Ajax cleanser can that had been modified with a false bottom for concealing narcotics; an envelope addressed to Holly Brewer that contained instructions on how to manufacture methamphetamine; a Crown Royal bag containing seventeen .45 caliber Glock magazines; empty blister packs of pseudoephedrine

tablets; sandwich baggies; a Benelli 12-gauge shotgun with an extended magazine; a military-type knife; a .223 caliber AR-15 assault rifle with a loaded thirty-round clip and two empty thirty-round clips; a .308 caliber AR-10 assault rifle; an ink-pen casing that could be used to snort narcotics; a white powder "cutting agent;" digital scales; and numerous packages addressed to Holly Brewer. Access to the locked gun safe was accomplished after Cothern surrendered the key to the police.

He asserts that the State failed to prove "some additional factor" that linked him to the contraband, as required for a conviction in cases involving joint occupancy. He recites all the evidence that ties the contraband to Misty and asserts that there is nothing to indicate that he owned the red duffle bag, that there was no indication that he was aware of the content of the package that had been delivered just minutes before police entered the residence, and that there was nothing to tie him to the gun safe except the key. We disagree.

A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Young v. State*, 371 Ark. 393, ___ S.W.3d ___ (2007). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* To convict a person of possession of contraband, the State must prove that the accused knew it was contraband and exercised control or dominion over it. *Dodson v. State*, 88 Ark. App. 380, 199 S.W.3d 115

(2004). Constructive possession may be established by circumstantial evidence. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991).

Contrary to Cothern's assertion, the fact that he possessed the key to the gun safe was not an inconsequential fact. In our case law, possession of a key to a container or location where contraband was found has been found to be synonymous with control. *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005); *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991); *Cooper v. State*, 84 Ark. App. 342, 141 S.W.3d 7 (2004). In this instance, the key provided sufficient evidence that he had dominion and control over all of the items in the gun safe. That contraband included drug paraphernalia used in the manufacture of methamphetamine. Items found in the gun safe also tied Cothern to the items found in the red duffle bag. As noted previously, seventeen .45 caliber Glock handgun magazines were found in the safe. These magazines were compatible with the handguns found in the duffle bag, where methamphetamine was also found. Moreover, while it is true that several items found in the safe and the duffle bag were clearly associated with Misty, this co-mingling of property does not inure to his benefit. We note that the jury was given an accomplice instruction, and we believe that the commingling of property is proof that Cothern and his wife possessed the contraband jointly.

Cothern next argues that the trial court erred by refusing to give his proffered non-AMCI jury instruction on the legal definition of joint occupancy. He acknowledges that under *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987), and *Haygood v. State*, 34 Ark. App. 161, 807 S.W.2d 470 (1991), the trial court is required to give a non-AMCI

instruction only when the AMCI instruction does not correctly state the law or where there is no AMCI instruction on the subject, but asserts that the jury should have been given "more direction on the legal standard regarding joint occupancy than is provided by the current AMCI instruction." Cothern asks us to overrule Holloway and *Haygood*. We reject this argument.

Cothern's proffered instruction stated:

> To prove constructive possession of contraband in premises where there is joint occupancy, the State is required to prove that appellant exercised care, control, and management over the contraband and also that the accused knew that the matter was contraband.

The trial court, however, gave the AMCI instruction, which states:

> Possession: There are two kinds of possession, actual and constructive.
>
> Actual possession of a thing is direct physical control over it.
>
> Constructive possession exists when a person, although not in actual possession of a thing, has the right to control it and intends to do so, either directly or through another person or persons.
>
> If two or more persons share actual control or constructive possession of a thing, either of them may be found to be in possession.

In viewing the AMCI instruction in question, we cannot say that it was not a legally sufficient definition of constructive possession. Accordingly, we believe this case is controlled by *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). There, the supreme court rejected an argument that was nearly identical to Cothern's argument. Not only did the supreme court reject the invitation to overrule *Holloway* and *Haygood*, it affirmed the validity of the AMCI instruction that Cothern challenges. It stated that "just because a proffered jury

instruction may be a correct statement of the law does not mean that a circuit court must give the proffered instruction to the jury" and reaffirmed that "a non-AMI instruction is only to be given when the AMI instruction does not correctly state the law or where there is no AMI instruction on the subject."

Affirmed.

GRIFFEN and HUNT, JJ., agree.